

DOCKET FILE COPY ORIGINAL

RECEIVED

FEB 24 1994

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Limitations on Commercial Time on)
Television Broadcast Stations)

MM Docket No. 93-254

REPLY COMMENTS OF THE
NATIONAL INFOMERCIAL MARKETING ASSOCIATION

The National Infomercial Marketing Association (NIMA)
submits these reply comments in connection with this Notice of
Inquiry.

The great majority of parties who submitted comments in this
proceeding supported NIMA's position that the Commission should
not initiate a rulemaking to consider reimposition of commercial
time limits on broadcast stations.

Only two entities, the Center for the Study of Commercialism
et al. (CSC) and the United States Catholic Conference, support
the initiation of a rulemaking. Their comments, however, do not
provide any evidence to justify such a proceeding. The
proponents would have the Commission exercise a greater degree of
control over commercial speech than the Commission applied when
viewers had few sources of video programming. Their proposals
ignore critical developments that have transformed the video
market, in which broadcast stations face extensive competition
from cable television and other programming sources. In this new
environment, their approach would substantially harm the public
interest and restrict commercial speech in violation of the First
Amendment.

No. of Copies rec'd
List A B C D E

0 + 8

I. The Proponents of a Rulemaking Are Concerned with Problems Beyond the Commission's Power To Remedy.

In large measure, the parties supporting a rulemaking seek to have the Commission remedy problems that are beyond its power to solve. For example, the Center for the Study of Commercialism argues (at 15) that excessive levels of commercials "contribute to greater pollution and environmental degradation; personal financial difficulties; health problems related to excess drinking, smoking, and poor diet; and disinterest in government and society at large". It also suggests (at 25 n.65) that advertising may promote "selfishness, spendthriftiness, materialism, and other values that impact adversely our democratic society".

In essence, the CSC is asking the Commission to use its regulatory authority to redress these perceived moral or ethical problems, something that lies far beyond the authority of the Commission or any other agency.

II. The Proponents Raise Issues that Are Not Germane to This Notice and Would Not Be Remedied by Commercial Time Limits.

In other respects, the proponents of a rulemaking have used their comments on the Notice as an opportunity to resurrect issues involving advertising that they have presented to the Commission in other contexts. However, these extrinsic issues are not germane to this proceeding. Even if the proponents' contentions were valid, the issues that they raise would not be remedied by reimposition of commercial limits. In any event, the proponents have failed to rectify the failure of their prior

submissions to make a showing that would justify action by the Commission.¹

In particular, the Center for the Study of Commercialism has raised again (at 8-10, 28-29) its request that the Commission initiate a proceeding to require continuous sponsorship identification for program-length commercials. As NIMA demonstrated when this request was first submitted,² the CSC has failed to show any basis for Commission action. Its contentions that general viewers are unable to distinguish between entertainment and commercial programming is contrary to the facts and the considered judgment of the Federal Trade Commission. As the CSC admits (at 7), the infomercial format has proved popular with viewers and has become a staple of broadcast advertising. Any residual concern, surviving from the time when this format was first introduced, that viewers might not recognize these programs as commercials has been resolved through effective industry self-regulation, notably the adoption of the NIMA Marketing Guidelines. Finally, the FTC maintains enforcement

¹For example, the CSC argues that the Commission should undertake a rulemaking to review its contention that advertisers exercise undue influence over program content. This issue is not germane to this proceeding, however, because the alleged problem would not be remedied by reimposition of commercial time limits. In any event, the evidence suggests that power over program content is held by viewers, and that consumer boycotts are an effective tool for controlling the contents of broadcast advertising. See Kinsley, "Rules for Consumer Boycotts", Washington Post at A31 (Nov. 22, 1990).

²Comments of NIMA in Continuous Sponsorship Identification for Program-Length Commercials, RM-7984, submitted June 10, 1992.

oversight to make certain that, as in all other advertising media, individual programs do not mislead the public.³

The CSC's comments do not introduce any evidence to justify their request for continuous sponsorship identification, but simply summarize and rehash its prior submission. Accordingly, there has been no showing of need for action by the Commission.

III. The Proponents Have Presented No Facts Justifying Initiation of a Rulemaking and Have Ignored Crucial Factors Supporting the Commission's Current Policy.

To the extent that they do raise issues germane to this proceeding, the proponents have suggested no justification for initiating a rulemaking. In addition, they do not discuss several important factors that support continuation of the Commission's current policy. Finally, the proponents do not even address the First Amendment objections to their proposal, preferring to ignore recent judicial decisions that create substantial (and we believe insurmountable) obstacles to their proposal to reimpose the regulatory scheme adopted in a time of few video programming alternatives.

A.) Absence of Supporting Evidence. The proponents present no facts or data that would justify a rulemaking. Their entire position is based on a subjective value judgment that "[e]xcessive advertising precludes other more valuable and

³Similarly, the Center renews its concerns with Commission regulation of commercial programs directed at children. However, these complaints would not be addressed in any way by the adoption of overall limits on the amount of commercial programming a broadcast station may carry.

beneficial types of programming." (Comments of the Center for the Study of Commercialism at 6). But the proponents provide no showing of how the Commission should (or could, consistent with the First Amendment) rank order programming to determine the relative value and benefits of various types of shows.⁴ Nor do they suggest any principled basis on which the Commission could determine how much commercial speech is "excessive".⁵

B.) Failure to Address the Role of Advertising in Broadcast Television. The proponents also ignore the function of advertising in broadcast television. They regard commercial programming as a negative factor that "reduces the amount of time the licensee devotes to service to the viewing public".

(Comments of United States Catholic Conference at 1; see Comments of CSC at 3). This view has been conclusively rejected by the Supreme Court, which has stated that commercial speech "performs and indispensable role in the allocation of resources" and thereby "serves individual and societal interests in assuring informed and reliable decisionmaking." Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1512 n.17 (1993).

⁴Indeed, the Commission has expressly refused to conduct a subjective evaluation of various program formats from concern that this approach would constitute a content-based regulation of speech, in violation of the First Amendment.

⁵Rather, the Center suggests (at 25) that the Commission should "consult with academic and other psychologists, marketing experts, and sociologists to obtain expert opinion and any relevant studies" and expresses its confidence that "[w]ith this information, the Commission be able [sic] to determine an acceptable level of advertising and to establish appropriate commercial limits for broadcasters."

Further, the proponents ignore the economic role of commercials in free, over-the-air television. Sale of advertisements is the only income stream available to these stations. It thus provides the only means by which they can afford to purchase the kinds of programs that the proponents would prefer to see. The proponents, however, completely ignore the relationship between commercials and other types of programming, and never discuss the effects that reimposition of commercial limits would have on broadcasters.

C.) Expansion in Video Programming Alternatives. The proponents do not discuss the proliferation in video programming alternatives available to viewers, which was one of the principal bases for the Commission's 1984 decision to remove commercial limits. By failing to acknowledge the existence of a highly competitive video market, the proponents ignore the substantial evidence that consumers effectively dictate limits on commercial programming by their channel selection decisions.

D.) Competitive Considerations. As the Commission has long recognized, free, over-the-air television is locked in a competitive struggle with cable systems and has been losing market share. The proponents fail to address the competitive implications if commercial programming on broadcast stations was limited, while their cable competitors were not subject to such restrictions.

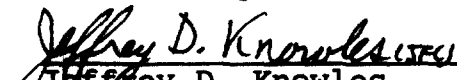
E.) First Amendment Concerns. The proponents completely ignore the First Amendment implications of their proposal to reimpose quantitative limits on commercial speech carried by broadcast television.

CONCLUSION

The proponents of reimposition of commercial programming limits on broadcast television have provided no evidence and have shown no justification why the Commission should initiate a rulemaking to consider such a fundamental change in policy. The Commission should terminate this inquiry under the cardinal principle of Federal regulatory policy: "First, do no harm."

Respectfully submitted,

National Infomercial
Marketing Association


Jeffrey D. Knowles
John F. Cooney

Venable, Baetjer,
Howard & Civiletti
1201 New York Avenue, N.W.
Washington, D.C. 20005

February 4, 1994